IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900

No. 148.

J. M. MOORE, PLAINTIFF IN ERROR,

vs.

D. B. STONE, AMMVILLIS ALLEN, ALMA MAY STONE, EDWIN R. STONE, LUCY MYRTLE STONE, SYLVIA S. JENKS, WARREN L. STONE, ORSON EMER STONE, HARLAND CLIFFORD STONE, AND ORLIE OTIS STONE, DEFENDANTS IN ERROR.

Argument for Defendants in Error.

The complaint, printed in transcript (pp. 1 to 13, inclusive), sets out the several sections of the act of Congress of July 2, 1864, which are proper to be considered in determining the sufficiency of the complaint, and also the supplementary joint resolution of Congress of May 31, 1870, and it is not considered necessary to reproduce them here. The complaint also sets out decisions by the Commissioner of the General Land Office and by the Secretary of the In-

terior, in which it would appear that some of the questions of law urged by plaintiff in error were considered and adjudicated against him in the Interior Department; but it does not appear from these decisions, nor from any averment in the complaint, that other questions of fact were not considered and decided in the Interior Department, either before or after the decisions set out in the complaint, which would make the error of those decisions, if erroneous in any respect, innocuous and void of harm. It was essential for the Land Office to find two facts in order to give the railroad company any standing whatever to dispute the preemption claim of defendant Stone: First. That there was a deficiency in the place lands granted to it, which would entitle it to resort to the lieu or indemnity lands. Second. That the indemnity lands selected by it, although within the indemnity limits, were not reserved, sold, granted, or otherwise appropriated prior to the attaching of its rights, and that the same were then free from pre-emption or other claims or rights. The complaint undertakes to conclude these matters by averring the facts as it was claimed they existed, but nowhere does it aver that such facts were found in favor of the railroad company by the department officers, nor does it negative anywhere that such facts may have been found against the railroad company by those officers.

From the facts found by the Commissioner and by the Secretary of the Interior, as disclosed in the complaint, it is seen that the defendant Stone settled on the land in question April 25, 1882, and that he has resided there ever since; that in 1882 he built a house, dug a well, and cultivated a garden on the place; in 1883 he cropped 15 acres to grain; in 1884 and 1885, 15 acres; in 1886 and 1887, 40 acres; in 1888, 45 acres; in 1889, 140 acres, and in 1890, 155 acres; that he had fenced the whole place and had improvements on it worth $700 to $800. The department also found that

the land was occupied and improved by Stone as the home of a qualified settler at the date of the selection by the railroad company. The foregoing are the only facts deemed necessary to be stated in addition to those set out in the brief of plaintiff in error.

ARGUMENT.

First. Nearly every question urged by plaintiff in error is settled against him by the late case of Northern Pacific Railroad Company *vs.* Sanders, 166 U. S., 620. It was there decided that it was the purpose of the act of Congress granting lands to the Northern Pacific Railroad Company to leave the same open to entry, settlement, and the initiation of claims by the general public up to the time that the grant of the company attached to the lands. As is now well established, the grant attached to place lands on the filing of the map of definite location, and to indemnity lands at the time of their selection with the approval of the Secretary of the Interior.

"The only ground on which a contrary view can be rested is the provision in the sixth section of the act of 1864 that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with section three, which manifestly contemplates that rights of pre-emption or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established. Literally interpreted, the words above quoted from section six would tie the hands of the Government so that even it could not sell any of the odd-numbered sections of the land after the general route was fixed—an interpretation wholly inadmissible in view of the provisions in the third section. The third and sixth sections must be taken together, and so taken it must be ad-

judged that nothing in the sixth section prevented the Government from disposing of any of the lands prior to the fixing of the line of definite location, or for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

Northern Pacific Railroad Company *vs.* Sanders, *supra.*

If any re-enforcement of the above reasoning were necessary, it is found in the fact that the joint resolution of Congress approved May 31, 1870—a resolution passed at the instance of the railroad company and for its benefit, and upon which it acted,—gave legislative construction to the granting act of 1864 in exact accordance with the judicial construction reached by the court from a consideration of the act of 1864 alone. (See 16th United States Statutes-at-Large, p. 378.)

Under this holding we are relieved from a consideration of the questions treated of at great length in the brief of plaintiff in error concerning the validity of the several withdrawals of the granted lands by the Secretary of the Interior and the effect of such withdrawals upon the right of settlers to initiate homestead and pre-emption entries.

Second. The only question left to be considered is, Was the settlement of the defendant in error, Stone, on the land in question, prior to the selection of the land by the railroad company, such a settlement as excepted the land from the grant to the railroad company? Stone settled in 1882. The company undertook to select the land in 1883. The department found Stone to be a "qualified settler" on the land, and that his settlement was followed up seasonably by valuable improvements. As soon as might be, conformably to the practice of the department, he perfected his entry and received patent. What steps, if any, he had taken to make record of his settlement prior to the filing of June 30, 1884, the complaint does not state, nor do the proceedings

before the Land Department, so far as the complaint sets them out, disclose. So far as anything appears to the contrary, he was on the land regularly as a pre-emption settler, having taken all the steps permitted to him to protect himself against adverse rights. He was so treated in the hearing before the department, and without suggestion from the railroad company to the contrary. It does appear from the complaint that during all this time there was an order from the Commissioner of the General Land Office on file at the local land office withdrawing the land in controversy from homestead or pre-emption.

Under these facts we claim :

a. That the land was not free from pre-emption at the time the company undertook to select it. Stone, a qualified settler, had settled thereon, made valuable improvements thereon, and lived thereon continuously with the intention of acquiring title under the pre-emption laws. He was in default, if at all, only in respect to the filing of his declaratory statement. The only penalty fixed by the statute for the failure of such a settler to file his declaratory statement is declared as follows :

"Otherwise his claim shall be forfeited and the tract awarded to the next settler in the order of time, on the same tract of land, who has given such notice and otherwise complied with the conditions of the law " (Revised Statutes, section 2265).

That this forfeiture inures only for the benefit of another settler, and that if the right of such a settler has not intervened the original settler may file his declaration at any time, has been the settled law ever since the case of Johnson *vs.* Towsley, 13 Wallace, p. 72. The court in that case say :

"If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after

the three months, while the party is still in possession, he makes his declaration, and this is done before any one has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made, and we think that Congress intended to provide for the protection of the first settler by giving him three months to make his first declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section under a sound construction of its meaning" (Johnson *vs.* Towsley, *supra.* See also, to same effect, Lansdale *vs.* Daniels, 100 U. S., 113; Whitney *vs.* Taylor, 158 U. S., 85).

b. The order of the Commissioner of the General Land Office withdrawing the land from entry excused Stone from filing his declaratory statement. While the order had no validity in law, it was binding as a rule of action on the subordinate officers, and it was undoubtedly their duty to obey it. Undoubtedly they would have obeyed it. An attempt, then, on the part of Stone to make his filing would have been vain and useless, and the law does not exact a vain and useless thing from any person (Tracey *vs.* Irwin, 18 Wallace, 549; United States *vs.* Lee, 106 U. S., 196).

c. The complaint is silent as to what steps, if any, Stone may have taken between the date of his settlement on the land and the acceptance of his declaratory statement at the land office to attempt to comply with the requirement of the law concerning the filing of his declaratory statement within three months. For aught that appears he may have offered his declaration within the time provided and had the same refused. He was treated by the Land Department as a qualified settler on the land, and his position in that respect

does not appear to have been questioned by the railroad company. The only question raised by the company and litigated by it in that hearing was whether such a settler as Stone was, having qualified himself in every way, could take in opposition to its grant. Indeed, it is questionable if that is not the only contention intended to be raised by the complaint here.

We respectfully submit that the complaint is insufficient to negative either the *bona fides* of Stone's settlement or the doing by him of every act necessary to keep his rights alive against any and every person in the world, or to show that on the facts before the Land Department that department had committed an error in law in deciding such to be his status (Durango, etc., Co. *vs.* Thayer, 80 Federal Reporter, 427).

Third. But if we are in error in insisting that Stone was a qualified pre-emptor, with all the standing and rights of such, at the time of the selection of the land by the company, notwithstanding his failure to file declaratory statement, we insist that his settlement, residence, and cultivation with the intention of availing himself of the pre-emption law constituted a "claim" within the meaning of the excepting clause of the granting act.

The place lands to which the grant of the railroad company attached were lands not "reserved, sold, granted, or otherwise appropriated and free from pre-emption or other claims or rights."

The indemnity lands, to which the railroad company was entitled to resort in case of deficiency in the place lands, are described in the statute simply as "other lands." What "other lands" did the statute intend to give the company a right to resort to? Manifestly, other lands of the class directly granted, other lands "not reserved, sold, granted, or otherwise appropriated and free from pre-emption or other

claims or rights." It is impossible to suppose that, as to indemnity lands which the company might never be compelled to resort to, and which it was never contemplated it would be required to exhaust, Congress intended to deal more illiberally with the general public than when dealing with place lands. If, then, a settlement of the character of the defendant in error on place lands would defeat the attaching of the grant of the company to such lands, such settlement on indemnity lands would *a fortiori* defeat their selection by the company.

Such a settlement as that of defendant in error, according to the settled mode of construing these land grants, excepts the land from the operation of the grant. Such grants are construed strictly against the grantees and liberally in favor of the public whose rights may conflict with those of the grantees. If the settlement can be said to have been not a pre-emption because there had been no filing, it certainly constituted a "claim or right" within the meaning of the excepting clause (Broder *vs.* Water Co., 101 U. S., 274; R. R. Co. *vs.* U. S., 92 U. S., 733; Shipley *et al. vs.* Cowan, 91 U. S., 330; Kansas Pacific R'y Co. *vs.* Dunmeyer, 113 U. S., 629; Northern Pacific R. R. Co. *vs.* Musser Santry Co., 168 U. S., 164).

"We have had occasion to construe a very common clause of reservation in grants to other railroad companies and in aid of other works of internal improvement, and in all of them we have done so in the light of the general principle that Congress, in the act of making these donations, could not be supposed to exercise its liberality at the expense of pre-existing rights, which, though imperfect, were still meritorious and had just claims to legislative protection" (Broder *vs.* Water Co., *supra*).

"The company had no absolute right until the road was built or that part of it which came through the land in question. The homestead man had five years of residence and cultivation to perform before his rights became absolute. The pre-emptor had similar duties to perform in regard to cultivation, residence, &c., for a shorter period, and

then payment of the price of the land. It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligations. Least of all is it to be supposed that it was intended to raise up, in antagonism to all the settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the Government as to the performance of their obligations" (Kansas Pacific R'y Co. *vs.* Dunmeyer, *supra*).

"In construing a public grant, as we have seen, the intention of the grantor, gathered from the whole and every part of it, must prevail. If on examination there are doubts about that intention or the extent of the grant, the Government is to receive the benefit of them. * * * Such grants could not otherwise be construed; for Congress cannot be supposed to have thereby intended to include land previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of it was not necessary; because the policy which dictated them confined them to land which Congress could rightfully bestow without disturbing existing relations and producing vexatious conflicts" (R. R. Co. *vs.* U. S., *supra*).

"But whilst, according to these decisions, no vested right as against the United States is acquired until all the prerequisites for the acquisition of the title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acquisition of the land when the United States shall have determined to sell or donate the property. In all such cases the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be first in right" (Shipley *vs.* Cowan, *supra*).

"Certainly, after this withdrawal, the Wisconsin Company had the right, if its necessities required by reason of a failure of lands in place, to come into the indemnity limits and select these lands. Can it be said that they were free from such right when the very purpose of the withdrawal was to make possible the exercise of the right? But the language is not simply 'free from rights,' but 'free from claims,' and surely the defendant railway company had an existing claim. No one can read this entire description without being impressed with the fact that Congress

meant that only such lands should pass to the Northern Pacific as were public lands in the fullest sense of the term, and free from all reservations and appropriations and all rights or claims in behalf of any individual or corporation at the time of the definite location of its road" (Northern Pacific Railroad Co. *vs.* Musser Santry Co., *supra*).

Fourth. We do not read the case of The N. P. R. R. Co. *vs.* Colburn, 164 U. S., 383, as conflicting with any of the foregoing views. In that case there was nothing to show that Kelly, the occupant of the land, was a qualified, *bona fide* settler under the homestead or pre-emption laws. He had never made any filing on the land, and his occupancy had long been abandoned. The decision of the Secretary of the Interior, as noticed by the court, was based simply on the fact of occupation and cultivation. He was a mere squatter, a trespasser, without rights against the Government or against any person or corporation.

It would be impossible for any court to hold that occupancy of such a trespasser constituted either a pre-emption or a "claim or right" within the meaning of the excepting clause of the railroad land grant; but that the court did not mean to hold that as against this railroad grant an actual filing was necessary to constitute a *bona fide* settlement by a pre-emptor or homesteader which would defeat the grant is evident from the concluding paragraph of the opinion. The court there notices the omission of the word "attached" from the Northern Pacific grant, which word had been deemed significant in the construction of other grants, and expressly reserves the effect of that and also of other peculiarities of the case for further consideration.

The supreme court of Minnesota, in the case of McHenry *vs.* Nygard, 72 Minn., 2, have fallen into the error of counsel for plaintiff in error in construing the Colburn case; but that court offers nothing by way of reasoning to sustain the position for which it cites the Colburn case as authority,

and of course if it has erred in construing that case, then its force as an authority or precedent falls to the ground.

In the department cases cited by plaintiff in error on page 11 of his brief, following the Colburn case, the grants under construction all used the word "attached," and the decisions all proceed on the peculiar significance attached to that word by the decisions of this court. Moreover, each of the cases will be found on examination to have had special features negativing the *bona fides* of the settlement.

Fifth. On the question of the Executive withdrawal or reservation, which the plaintiff in error insists operated as a bar to the initiation of a pre-emption right by Stone, we submit, in addition to the case of Northern Pacific Railroad Company *vs.* Sanders, *supra*, the following departmental decisions:

N. P. R. R. Co. *vs.* Miller, 7 Land Dec., 100; N. P. R. R. Co. *vs.* Davis, 19 Land Dec., 87; Cole *vs.* N. P. R. R. Co., 17 Land Dec., 8; N. P. R. R. Co. *vs.* Fugeli, 10 Land Dec., 288; Spencer *vs.* N. P. R. R. Co., 10 Land Dec., 440; S. P. R. Co. *vs.* Kanawyer, 23 Land Dec., 500; M., K. & T. R. Co. *vs.* Troxel, 17 Land Decisions, 122; N. P. R. Co., *vs.* Lilothun, 21 Land Dec., 487; Grunewald *vs.* N. P. R. Co., 24 Land Dec., 195; N. P. R. Co. *vs.* Willis, 21 Land Dec., 395; S. P. R. Co. *vs.* McKinley, 22 Land Dec., 493; N. P. R. Co. *vs.* Flannery, 20 Land Dec., 127; Stuart *vs.* S. P. R. Co., 22 Land Dec., 61; Hastings *vs.* Christensen, 22 Land Dec., 257.

The foregoing cases amply sustain the position that all these withdrawals were nullities because in conflict with the true intent and purpose of the granting act.

The plaintiff in error takes issue in his brief with the decisions of the Land Office, but he does not notice the Sanders case, decided by this court, and which is infinitely more sweeping in its effect than any of the departmental decisions.

His idea that the positive direction of section 6 of the

granting act, to the effect that all lands on the line of the road not granted should be open to homestead and pre-emption settlement, was for the purpose of abrogating the provision of the pre-emption act of 1841, reserving from the operation of that act the sections of land alternate to other sections granted to the States in aid of canal, railroad, or other public improvement, falls to the ground when we examine the act of Congress approved June 2, 1862 (12 Statutes at Large, p. 413). That act was intended to remove all restrictions on the right to pre-empt lands fitted for pre-emption settlement and not otherwise appropriated. It removed the restriction against settlement on unsurveyed lands and on alternate reserved sections on lands within railroad land grants. It was so construed by the compilers of the Revised Statutes and has ever since received such construction by the Land Department. (See Revised Statutes, sec. 2257.)

The words "all the lands" in the act of 1862 have been properly construed to mean all lands fitted for agriculture, not valuable for minerals or salines, and not reserved or occupied for some one of the manifestly overruling purposes mentioned in the pre-emption act of 1841. The right was extended to all such lands, subject to the other conditions, restrictions, and stipulations of the act of 1841. The act of 1862 must have been so construed to have had any sensible effect at all, because all the limitations on the character of the lands which might be pre-empted were in the same section of the act of 1841 and stated in the same way, and it is manifest that it was not intended to leave them all in force.

The language of the act of 1862 is as follows:

"That all the lands belonging to the United States to which the Indian title has been or shall be extinguished, shall be subject to the operations of the pre-emption act of the fourth of September, eighteen hundred and forty-one, and under the conditions, restrictions and stipulations therein mentioned."

It will be seen, then, that the act of 1862, two years before the granting act here under consideration, had accomplished the purpose which plaintiff in error insists the provisions of section 6 of the granting act were intended to accomplish.

But, in view of the decision of this court in the Sanders case, there is but little utility in considering what object Congress had in mind by the use of the language employed in section 6 of the granting act. That case holds that section 6 must be construed in connection with section 3, and that, construing both together, it is shown to have been the intention of Congress to leave both the lands granted and those not granted, the place lands as well as the indemnity lands, open to settlement, purchase, and the initiation of claims at all times prior to the attaching of the title of the railroad company, and the consequence necessarily follows that prior to the attaching of the railroad title there could be no withdrawal, and after the attaching of the railroad title withdrawal would be a vain and futile act.

Seventh. It is the doctrine of this court in this class of cases, too well settled to need the citation of authorities, that a party seeking the aid of the court must prevail, if at all, on the strength of his own right and not on the weakness of the title of his adversary. The lands sought to be subjected to plaintiff's right are indemnity lands, never granted to the company, but the latter was given the right to resort to them in the event of the United States not having "full title" to all the granted lands, or some of them having been "reserved, sold, granted, or otherwise appropriated," or their not being "free from pre-emption or other claims or rights" at the time of the definite location of the road. The company had no right or title in them prior to their selection, with the approval of the Secretary of the Interior, in lieu of lands in place which had been lost to the company

by reason of the excepted cases referred to (Kansas & Pacific R. Co. *vs.* Atchison R. Co., 112 U. S., 414; St. Paul, etc., R. Co. *vs.* Winona R. Co., 112 U. S., 720; Ryan *vs.* C. P. R. Co., 99 U. S., 382; Cedar Rapids, etc., R. Co. *vs.* Herring, 110 U. S., 27; Wisconsin R. Co. *vs.* Price Co., 133 U. S., 496; Wisconsin R. Co. *vs.* Forsythe, 159 U. S., 46).

This court, in Wisconsin R. Co. *vs.* Price Co., *supra*, laid down the rule which should govern in the allowance of these indemnity selections as follows:

"The approval of the Secretary was essential to the efficacy of the selections and to give the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the lands granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected, could be properly taken for those deficiencies."

Where is the allegation in the complaint that the Secretary found any deficiency in the place lands, or that the particular indemnity land selected could be properly taken for those deficiencies? There is none. That this omission is fatal to the sufficiency of the complaint we cite Durango, etc., Co. *vs.* Evans, 80 Federal Reporter, 427; Stewart *vs.* McHarry, 159 U. S., 643; Bishop of Nesqually *vs.* Gibbon, 158 U. S., 155; Steel *vs.* S. M. R. Co., 106 U. S., 447; Gale *vs.* Best, 78 Cal., 235; New Dunderberg Min. Co. *vs.* Old *et al.*, 79 Fed. Rep., 598.

The case of St. Paul and Pacific R. Co. *vs.* N. P. R. Co., 139 U. S., 1, properly considered, does not militate against this position. The question in that case was between two land-grant roads. The St. Paul and Pacific, taking under a later grant than the Northern Pacific, undertook to extend its place grant over the indemnity limits of the North-

ern Pacific. The court held that this could not be done. Said the court :

"We are of opinion that the exception in the act making the grant to the Northern Pacific Railroad Company was not intended to cover other grants for the construction of roads of a similar character, for this would be to embody a provision which would often be repugnant to and defeat the grant itself."

This was stated by Mr. Justice Brewer in another form when deciding the same case in the lower court :

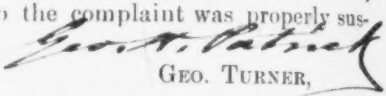
"The decision in 97 U. S., *supra*, places all land-grant roads on the same plane, and that a different one from that occupied by settlers and private purchasers, and settles all conflicts of title by a rule clear, simple, and just, viz : priority of grant. Congress may fairly be regarded as standing indifferent between all roads and intending to apply this just and simple rule of priority as between successive beneficiaries" (Northern Pac. R. Co. *vs.* St. Paul, etc., Co., 26 Federal Rep., 551).

The concluding language from the principal opinion quoted in the brief of plaintiff in error must be considered in the light of the parties before the court and the nature of the right urged by each. The allowance of the right of either would absorb everything and leave nothing for the other. Moreover, if the right of the Northern Pacific attached, it was prior in point of time and left nothing whatever for the grant of the St. Paul and Pacific to operate on. As between two such litigants urging such rights, the court might well say, "there was therefore no occasion for the exercise of the judgment of the Secretary in selecting them (the lands), for they were all appropriated."

Upon all the foregoing questions except those relating to the qualification of defendant in error, Stone, as a pre-emption settler, we cite, as determining those questions in our

favor, the late case of Southern Pacific Railroad Company *vs.* Wood, 124 California, 475.

We respectfully submit that the complaint is insufficient, and that the demurrer to the complaint was properly sustained.



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